In the Matter of	:	Date Issued: Aug. 9, 2000
DAVID W. PICKETT Complainant	:	Case No. 2000-CAA-0009
v.	:	
TENNESSEE VALLEY AUTHORITY, OFFICE OF INSPECTOR GENERAL, GEORGE T. PROSSER, and DONALD K. DRUMM Respondents	:	

Before:
Stuart A. Levin,
Administrative Law Judge

For Complainant:
Edward A. Slavin Jr., Esq.

For Respondents:
Thomas F. Fine, Assistant General Counsel
Brent R. Marquand, Senior Litigation Attorney
Dillis D. Freeman, Jr., Attorney

SUMMARY DECISION

On July 20, 1999, David W. Pickett, a former employee of the Tennessee Valley Authority, (TVA), filed a complaint alleging that TVA and two individuals, George T. Prosser and Donald K. Drumm engaged in discriminatory acts of retaliation against him in violation of various environmental whistleblower statutes, including the Clean Air Act, 42 U.S.C. 7622, (CAA); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9610, (CERCLA); the Solid Waste Disposal Act, 42 U.S.C. 6971, (SWD); the Safe Drinking Water Act, 42 U.S.C. 300j-9,(SDW); the Federal Water Pollution Control Act, 33 U.S.C. 1367,(FWPC); and the Toxic Substances Control Act, 15 U.S.C.

2622,(TSC), when they petitioned the Department of Labor, Office of Workers' Compensation Programs (OWCP) to terminate the disability benefits Pickett was receiving under the Federal Employees Compensation Act (FECA), and then allegedly refused to rehire him. The FECA benefits program is administered by the OWCP.

The matter is now before me on cross motions for summary decision. TVA filed a Motion for Summary Decision on May 23, 2000, on the ground that Pickett's complaint is barred as untimely filed. Complainant filed a Cross Motion for Summary Judgment on June 5, 2000, on the grounds, *inter alia*, that newly discovered evidence shows that TVA blacklisted him for engaging in protected activity.[1] Summary decision will be entered as set forth below.

Background

The record shows that David W. Pickett worked for TVA at its Widows Creek Fossil Plant near Stevenson, Alabama. On February 11, 1988, he injured his left shoulder, subsequently filed for worker's compensation, and received disability benefits from 1988 to 1999. From time to time during the period 1988-1993, TVA offered, but Pickett declined to accept, light duty assignments compatible with his physical capabilities as determined by his physicians. At the same time, TVA challenged Pickett's entitlement to benefits and provided OWCP with a report from Pickett's physician confirming his physical capacity to perform the jobs he was offered. When OWCP maintained Pickett in pay status, TVA staff referred the matter to TVA's Inspector General (IG) for investigation.

TVA's IG twice investigated Pickett. The IG's first report in 1991 confirmed Pickett's disability. Two years later, circumstances changed. Pursuing a "tip" that Pickett's activities were incompatible with his claim of total disability, the IG opened a new inquiry. Following an investigation, the IG, apparently impressed with Pickett's athletic capacity notwithstanding his total disability, reported numerous instances in which Pickett engaged in physical activities, including softball, basketball, golf, jogging, riding a stationary bike, Taichi, coaching youth basketball and baseball, and teaching Karate. In June, 1993, TVA submitted the

[1] By Notice issued April 25, 2000, a hearing on the merits in this matter was scheduled to convene on June 14, 2000. Prior to the hearing, Complainant Pickett and TVA moved for a continuance. Accordingly, pursuant to Rule 24.6(a), both parties having petitioned for postponement, the hearing was cancelled by Order issued June 12, 2000.

IG's report to OWCP, and on October 1, 1993, TVA terminated Pickett's employment. Thereafter, OWCP, in 1994, advised Pickett that his benefits would be reduced. Facing a potential reduction in benefits, Pickett applied for re-employment, but TVA was, by then, in the process of downsizing its workforce and had no vacant position suitable for Pickett.

For the next five years, Pickett received FECA benefits including job training which afforded him an Associate's Degree in Engineering Technology from Pellissippi Community College. On January 25, 1999, an OWCP Senior Claims Examiner determined that Pickett had no continuing medical condition or disability as a result of his on-the-job injury of February 11, 1988, and recommended termination of his compensation. A month later, OWCP informed Pickett that his benefits would terminate. On March 9, 1999, Pickett notified TVA of OWCP's decision and requested a "starting date for employment." He also requested OWCP to reconsider its decision terminating his compensation and OWCP denied his request on April 30, 1999. Two and one half months later, Pickett filed his complaint alleging that TVA discriminated against him as an environmental whistleblower.

Thus, eleven years after allegedly engaging in protected activity while employed at Widows Creek, Pickett, on July 20, 1999, filed a complaint against TVA, its IG, and two individuals alleging, *inter alia*, that they "mounted an illegal campaign to take Mr. Pickett from compensation (sic),"(Compl. Para. 22), and engaged in a continuing scheme of retaliation against him for his "protected concerns" under the CAA and other whistleblower laws. Specifically, Pickett claimed he "raised concerns" to management about faulty equipment resulting in excessive fly ash pollution, caustic burns caused by an unlabelled sink full of improperly stored caustic chemicals, uncleaned travelling screen coverage, and management negligence at Widows Creek for allowing the plant to operate with improperly functioning precipitators and coal pulverizers, un-emptied two-story fly ash containers, and horse-play in the control room, including the ignition of fireworks. In retaliation for expressing these concerns, Pickett believes Respondents subjected him to a hostile work environment, "lobbied" OWCP and improperly interfered with his right to worker's compensation for an on-the-job injury, wrongfully withheld information he demanded under the Freedom of Information Act (FOIA) and Privacy Act, improperly used the IG to wrongfully investigate his continuing right to receive compensation, procured sham medical evaluations by two "company" oriented physicians in furtherance of TVA's effort

to deny him compensation, terminated his employment, and then refused to rehire and blacklisted him, all in retaliation for his protected activity.[2]

Motions for Summary Decision

TVA rejects these charges. It moves for summary decision and dismissal of the complaint on essentially two grounds alleging that Pickett's complaint was not only filed untimely, but TVA's participation, as an employer in a FECA worker's compensation matter pending before OWCP, was entirely proper, authorized by regulation, and not subject to collateral review in this proceeding. TVA's motion also seeks dismissal of the individuals, Prosser and Drumm, because they were not Pickett's employer. George T. Prosser is TVA's Inspector General, and Donald K. Drumm is Manager of TVA's Widows Creek Fossil Plant.

Having been served with Respondents' motion, Pickett then responded and cross-moved for Summary Judgment. He denies his complaint is time barred, alleging that he first discovered, within thirty days of the date he filed his complaint, TVA's acts of retaliation and blacklisting. He, accordingly, argues that his complaint was timely filed. His motion then asserts that TVA is an employer covered by the Whistleblower statutes, with no sovereign immunity, and that he is a covered employee who engaged in protected activity when he raised concerns about air pollution controls, unsafe working conditions, and environmental health and safety concerns. He seeks sanctions against TVA on the ground that it withheld and destroyed evidence, including the Assistant Unit Operator (AUO) logs and stack monitoring reports, and otherwise withheld surveillance tapes and interview reports.[3]

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[2] In 1994, Pickett communicated with one of his state's two Senators allegedly complaining about intensified harassment for this protected activity "under the opposition clause." (See, Compl. Motion at pg. 5, citing CX 3). Although Pickett has not adduced evidence of the complaints about environmental concerns or harassment he expressed to his Senator, in construing facts in his favor for summary decision purposes, I accept as established his representation that such complaints were voiced and constitute protected activity.

[3] By Motion filed June 16, 2000, Respondent requested permission to reply to Complainant's response to its Motion for Summary Decision. The Motion was denied by Order issued June 19, 2000. On June 22, 2000, Respondent filed a Reply Brief, and Complainant has

Discussion

Summary decision may be entered pursuant to 29 C.F.R. Section 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See,* Gillilan v. Tennessee Valley Authority, 91-ERA-31, at 3 (Sec'y, Aug. 28, 1995); Flor v. United States Dept. of Energy, 93-TSC-1, at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §§ 18.40(c). *See*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. Anderson, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Held v. Held, 137 F.3d 998, 999 (7th Cir. 1998). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 Sup. Ct. 486 (1962); Rogers v. Peabody Coal Co., 342 F.2d 749 (6th Cir. 1965).

When a Respondent moves for summary decision on the ground that the Complainant lacks evidence of an essential element of his claim, the Complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. Lujan v. Defenders of Wild-life, 504 U.S. 555, 112 Sup. Ct. 2130 (1992); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Evidence submitted by a party opposing summary decision must then be considered in light of its content or substance rather than the form of its submission. Winskunas v. Birnbaum, 23 F.3d 1264 (7th Cir. 1994).

Considering the foregoing principles, and for reasons set forth below, summary decision will be entered holding TVA a covered employer under the CAA,

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moved that it be stricken and not considered. Complainant's motion is granted since Respondent's Reply Brief was filed in contravention of Rule 18.6(b). By letter dated June 29, 2000, TVA requested that its improperly filed Reply Brief be considered in connection with its response to Complainant's cross motion. TVA's request is, hereby, deemed a request to supplement its response, and, as such, it is denied as untimely.

the Toxic Substances Control Act, Safe Drinking Water Act, Federal Water Pollution Control Act, and other environmental laws, dismissing George T. Prosser and Donald K. Drumm as party respondents, and dismissing the complaint as time barred.

TVA is a Covered Employer in an Employer /Employee Relationship with Complainant

Pickett's cross-motion seeks summary decision declaring him a protected worker and TVA a covered employer under the environmental whistleblower laws. I have carefully reviewed TVA's response to Pickett's motion. It does not dispute that Pickett was an employee at its Widows Creek Plant, (*See*, TVA Response Page 1), and is now a former employee. Nor does it suggest that its operations are not subject to the jurisdiction of the environmental whistleblower laws. For purposes of adjudicating the pending motions, these facts are deemed established in Complainant's favor.

Dismissal of Individual Respondents

Pickett named the individuals Prosser and Drumm as party respondents in his complaint because, he contends, they acted out of animus toward him for his protected activity in a scheme of retaliatory harassment, *ultra vires,* by individuals "with the power and ability to ruin Pickett's life." Complainant recognizes that the Secretary of Labor has held that individuals are not covered "persons" under the environmental whistleblower provisions unless they are also employers within the meaning of the applicable statute. See, Stephenson v. NASA , 94 TSC 5 (Sec. 1995). He argues, however, that the Administrative Review Board (ARB) should revisit this holding in light of the grave facts of this case.

In Stephenson, complainant contended that the TSCA and CAA employee protection provisions contemplated complaints against "person[s]." The secretary noted, however, that while the provisions reference "person[s]" in the procedural subsections (b) - (e), the substantive prohibition contained in subsection (a) refers to "employer[s]." Although the TSCA defined the term "person" as "an individual,

corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the

United States and any officer, agent, or employee thereof" for purposes of the CAA. 42 U.S.C. §§ 7602(e), the secretary determined;

> The plain language of these employee protection provisions suggests that they were intended to apply to persons who are employers. That classification does not include the employees named here as respondents. Any other construction would require a clearer statement of intent than appears in the statutes at issue. For example, in a related area, courts have held corporate officers jointly and severally liable for unpaid wages under the Fair Labor Standards Act (FLSA) where the "economic reality" indicates sufficient control over the employment relationship. See *Dole* v. *Elliott Travel & Tours, Inc.,* 942 F.2d 962, 965 (6th Cir. 1991) and cases cited therein. This result follows from the FLSA definition of the term "employer" which "includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. §§ 203(d) (1988). Similarly, under the Mine Act, corporate "director[s], officer[s], and agent[s]" may be held liable for civil penalties under certain circumstances pursuant to explicit statutory directive. 30 U.S.C. §§ 820(c) (1988).

Accordingly, the secretary ruled that only employers are subject to the employee protection provisions of the [TSCA] and the [CAA]. While the CAA definition of the term "person" includes any "officer, agent, or employee" of the United States, the secretary considered the prohibition against discrimination by "employer[s]" in subsection (a) of its employee protection provision a more reliable expression of the intended application, and the rationale of Stephenson is equally applicable to the CERCLA and the other whistleblower statutes.

Since Complainant does not allege that the individual respondents employed

him during any period relevant to this proceeding, the secretary's ruling, as aholding of law based upon the agency's construction of the statute, is controlling.[4] I, therefore, conclude that Prosser and Drumm are entitled, as a matter of law, to summary decision dismissing them as respondents in this proceeding.

Timeliness of Filing

TVA further seeks dismissal of Pickett's complaint as untimely filed more than 30 days after the alleged acts of discrimination occurred. It notes that it opposed his receipt of FECA benefits from 1988 through January, 1999, and that Pickett was well aware, during this entire period, of its efforts to persuade OWCP to cease his disability compensation. It emphasizes that it terminated Pickett's employment in 1993, and he did not then protest its decision. TVA emphasizes that OWCP terminated Pickett's FECA payments in February, 1999, yet he did not file his whistleblower complaint until July 20, 1999. Finally, TVA asserts that it has not blacklisted Pickett, and he has adduced no evidence to the contrary. Accordingly, TVA believes no genuine issue of material facts exists that Pickett's complaint was untimely filed.

Pickett's Response

[4] Recent dicta cited in the ARB's most recent decision in Stephenson states: "A parent company or contracting agency acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment. For example, the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an "employer" for purposes of the whistleblower provisions. A contracting agency which exercises similar control over the employees of its contractors or subcontractors may be a covered employer. . . ." 94 TSC 5, (ARB, July 18, 2000). Notably, the dicta shifts from a discussion of liability of corporate entities, parent and subsidiary or "a subordinate company," to the parent company president, thus clouding the issue of individual responsibility. Nevertheless, the Board's discussion in this dicta would not apply to Prosser, and to the extent it is deemed consistent with the Secretary's 1995 decision in this case, and thus applicable to Drumm as Manager of the Widows Creek Plant where Pickett was employed, the complaint against Drumm must otherwise be dismissed for the same reasons, set forth *infra*, which compel dismissal of the complaint against TVA and the Office of Inspector General.

Ordinarily, the limitation period begins when a reasonably prudent employee would know or should have known that an adverse employment decision was discriminatory in nature, McGough v. U.S. Navy, 86 ERA 19 (Sec. 1993), and, as TVA contends, Pickett knew it was contesting his FECA claim and knew it terminated his employment years before the whistleblower complaint was filed. Assuming such actions were intended as retribution for protected activity, TVA correctly argues that the 30-day statute of limitations would, nevertheless, apply to bar Pickett's complaint. Pickett responds, however, that he first discovered the alleged blacklisting within 30 days of the complaint he filed on July 20, 1999, and blacklisting constitutes a pattern of continuing violation which otherwise tolls the statute of limitations.

Continuing Violations

When a course or pattern of discriminatory conduct is alleged, the statutory period begins on the day of the last discriminatory act, provided (1) the prior acts involve the same subject matter, (2) the acts are recurring, not isolated decisions, and (3) they involve a degree of permanence. *See*, Berry v. Bd. Supervisors of LSU, 715 F.2d 971, 979 (5th Cir. 1983); Thomas v. Arizona Public Service Co., 89 ERA 19 (Sec. 1993). Blacklisting a whistleblower in retaliation for protected activity satisfies all of the criteria for tolling the statutory period if a covered worker pursues his or her claim within 30 days of the date the employee knew or should have known the employer was engaging in blacklisting.

Now, in most instances, evidence of a continuing violation linking various adverse employment actions to a common subject requires the trier of fact to piece together disparate circumstantial factors. For purposes of evaluating TVA's summary decision motion, the facts must be construed in Complainant's favor. Thus, while TVA emphasizes that Pickett has failed to support any of his allegations of protected activity with an affidavit either in response to TVA's motion or in support of his own cross-motion, and at no time identified the TVA officials or managers to whom he allegedly "raised concerns" about environmental problems at Widows Creek, these arguments address the elements of Pickett's *prima facie* case. TVA's motion is predicated upon the statute of limitations and its asserted privilege to communicate with OWCP. As such, for purposes of adjudicating TVA's pending motion, Pickett's allegations that he engaged in protected activity in his communications with his Senator and by expressing the concerns set forth in his complaint to TVA management while he was employed at Widows Creek will be

deemed established. Consequently, if a genuine issue of material fact exists in respect to whether TVA covertly blacklisted Pickett for protected activity, TVA's motion must fail.[5]

New Evidence

The criteria for responding to a motion for summary decision is set forth at 29 C.F.R Section 18.40 (c). This rule provides, in part, as follows; "When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegation or denials of such pleadings. Such response must set forth specific facts showing that there is a genuine issue of material fact for hearing." The rule thus imposes upon the party opposing the motion a burden of production sufficient to demonstrate a genuine dispute of material fact.

In his response to TVA's motion, Pickett claims he received new, "smoking gun" evidence of blacklisting from TVA in response to his FOIA and Privacy Act requests. These documents, received within 30 days of the date he filed his complaint, he alleges, revealed to him, for the first time, TVA's on-going scheme to blacklist him. I have carefully reviewed these materials. They reveal nothing of the sort.

One such "smoking gun" document, a September 10, 1991, memorandum from Drumm to Melbe Wood, Rehabilitation Counselor, labeled "administratively confidential,(Exhibit CX-1)," for example, is described in Paragraph 5 of Pickett's complaint. Relying on this document, Pickett states that his environmental concerns "were known to TVA managers, who were angry at him for raising them," and that he was "perceived as an environmental whistleblower by Respondents, including Widows Creek Fossil Plant Manager Donald K. Drumm." Again, Pickett cites Drumm's September 10, 1991, memorandum as his supporting documentation for

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[5] TVA also contends that several of the alleged acts of discrimination, such as contesting Pickett's claim before OWCP, investigating the merits of his claim, overtly and surreptitiously, and reporting the results of its investigation to OWCP, were all undertaken in a manner consistent with an employer's rights to participate in a worker's compensation proceeding under FECA, and are privileged. Yet, whether or not such a privilege exists, and, if so, whether it was abused, need not here be addressed. If evidence of covert retaliation or blacklisting is not present, Complainant's continuing violation theory must fail, and the statute of limitations bars his complaint.

these assertions. Because Pickett also describes this document as the "blacklisting memorandum," its full text warrants repeating here. Thus, Drumm writes:

> Please contact Gregory Price, OWCP Rehabilitation Specialist, and explain that Mr. Pickett's permanent work station is Widows Creek Fossil Plant in Stevenson, Alabama. He voluntarily moved from this location to his parent's home in the Knoxville area. We have made repeated offers of employment within the limits of his alleged restrictions including an agreement to pay his moving expenses back to this area. TVA should not be obligated to offer employment in his present commuting area. Mr. Pickett has successfully sidestepped the return to work issue for three years by manipulating both OWCP and TVA. His apparent success in abusing the compensation system should be questioned and corrected.

I have read and re-read this memorandum in the context of Pickett's allegation that this is a "blacklisting memorandum," which shows that his environmental concerns "were known to TVA managers, who were angry at him for raising them." I have studied it for any indication which might tend to confirm his representation that this document shows he was "perceived as an environmental whistleblower by Respondents, including Widows Creek Fossil Plant Manager, Donald K. Drumm." Upon careful review, I conclude that Pickett mischaracterizes this evidence. The only fact it supports in Pickett's entire recitation is Drumm's position as Manager of the Widows Creek Plant.

I deem established Pickett's allegation that he communicated his environmental concerns to TVA management and, for purposes of considering Drumm's memorandum, to Drumm himself. Still, Drumm's memo otherwise provides no support whatsoever for the notion that he "perceived" Pickett as an environmental whistleblower and was concerned or angry about his protected activity. It contains no reference, directly or indirectly, to any environmental concerns or problems communicated by Pickett to anyone. Nor does Drumm even hint that Pickett should be blacklisted for expressing them.

To the contrary, rather than "blacklisting" Pickett, Drumm, if conveying any

emotion, expresses frustration that Pickett has not returned to work at the Widows Creek Plant. Whether or not he accurately understands TVA's obligation under FECA to offer work within any particular commuting area, blacklisting is not reasonably inferred from Drumm's comments. Here the alleged blacklister confirms the offer of jobs TVA had good reason to believe were suitable for Pickett and discusses TVA's offer to pay moving expenses to return Pickett to employment at the worksite where the alleged whistleblowering activities took place. Notwithstanding Pickett's description of it, this document demonstrates precisely the opposite of blacklisting activity or hostility toward a whistleblower. Drumm wants him back at work at Widows Creek.

Nor do any of Pickett's other documents provide a more reasonable basis than CX-1 for inferring that TVA blacklisted him. He claims that TVA's IG was a party to the scheme of retaliation for expressing his environmental concerns. The evidence confirms the IG's participation in an investigation of the legitimacy of Pickett's disability claim, but it also shows that George Prosser, while Manager of Fraud Investigations, confirmed, in his October 18, 1991, memo (CX-5(c), that "This evaluation supports Pickett's claim that he cannot perform the duties of his time-of-injury position."[6] Accordingly, Prosser closed the IG's fraud investigation. Pickett's contentions to the contrary notwithstanding, no retaliatory animus is evident here.

The IG subsequently received a report that Pickett was engaging in activities which were inconsistent with his claims of disability and reopened the investigation. (*See*, Affidavit of G. Donald Hickman, TVA, Assistant Inspector General for Investigations). Although Pickett doubts the IG received an anonymous tip, but only claims it did as a pretext for pursuing an inquiry in retaliation for his protected activity, the investigation revealed, and Pickett confirmed, that he participated in various activities including softball, basketball, golf, jogging, riding a stationary bike, Taichi, karate instruction, and coaching youth baseball and basketball. Pickett justified these activities as recommended by his physician, but he declined to provide a medical release which would have permitted the physician to confirm his representations, and the IG reported as much in its January 25, 1993, memo to TVA's Workers' Compensation Department (WCD). Whether or not surveillance

[6] While Prosser addressed Pickett's capacity to perform his "time-of-injury" job, as discussed in more detail *infra*, Pickett's physician approved light duty jobs and OWCP found them suitable for Pickett.

was employed as a means of confirming Pickett's disability, nothing in the IG's documents or other evidence upon which Pickett relies, suggests that Pickett's protected activity in any way influenced either the IG's investigative techniques, the results of the IG's inquiry, or the actions it recommended in the context of his claim of disability. Pickett's arguments to the contrary lack a basis in fact.

Pickett's evidence demonstrates nothing more than a challenge to a worker's claim of total disability by an employer who has evidence that the employee (1) may be capable of performing light duty jobs, (2) has been offered jobs found compatible with his limitations by OWCP, (3) has declined to accept the jobs offered, but (4) has engaged in recreational activities which appear inconsistent with his claimed disability. The merits of its challenge will be determined elsewhere,[7] however, the circumstances upon which TVA acted do not raise genuine issues of material fact that retaliation or blacklisting played any role in the decision to contest Pickett's claim.

Thus, construing the facts in Pickett's favor, neither the documents nor the general circumstances raise a genuine issue of material fact from which it might reasonably be inferred that TVA blacklisted Pickett based upon his protected activity as an environmental whistleblower or that Pickett discovered evidence of retaliation or blacklisting within 30 days of the date he filed his complaint. The evidence upon which Pickett relies, including the documents he describes as "smoking gun" evidence of hostility, retaliation, and blacklisting for his protected activity, shows that TVA, its IG, and the two individuals Pickett accuses of the most hostile, abusive retaliation and blacklisting spent considerable resources over a five year period, from 1988 through 1993, not blacklisting Pickett from TVA or other employment, but trying to determine the extent of his disability and return him to suitable work.

Documents submitted by Respondent thus confirm that Pickett was offered light duty jobs, including a position as Assistant Unit Operator at Widows Creek effective December 12, 1988, at an annual salary of $30,025. The record further shows, as previously noted, that Widows Creek was Pickett's work site prior to his injury, and where he allegedly engaged in protected activity. While hostility may be manifested in many ways, overtly or subtly as the Board recently observed in

[7] FECA claims are, as previously noted, administered by OWCP, and appeals from decisions rendered by OWCP are adjudicated by the Employees Compensation Appeals Board.

Melendez v. Exxon Chemicals Americas, 93 ERA 0006 (ARB, July 14, 2000), it is not manifest here. The "newly discovered" and other evidence demonstrates that TVA, contrary to Pickett's assertions of hostility and blacklisting, affirmatively endeavored to return him to gainful employment, but Pickett declined to report for work.

I have, of course, considered the possibility that an Employer, intent upon blacklisting a whistleblower, could offer jobs which exceeded the physical capacity of a protected employee as a mere cover for its unlawful activity. Such deception, however, is not evident here. While the merits of Pickett's FECA claim must be adjudicated before another forum, TVA had a reasonable basis for believing that the jobs it offered were suitable for Complainant considering his injuries at the time it offered them to him. Not only did Complainant's physician approve the jobs, but OWCP found the jobs offered by TVA suitable for Pickett considering his claimed disability. Indeed, there is, on this record, no genuine dispute of material fact that TVA offered them to Pickett to return him to productive employment.

Notwithstanding his protected activities, the evidence thus demonstrates that TVA attempted, over an extended period, not to bar Pickett's return, but to restore him, following his injury, to its workforce at the Widows Creek plant. Its job offers constitute substantial, credible evidence of the absence of blacklisting, and Pickett's "newly discovered" documents raise no genuine issue of material fact which controvert it.

Circumstantial Evidence

As noted above, TVA terminated Pickett's employment, without his objection, on October 1, 1993, and subsequently failed to rehire him. Yet, no document Pickett proffers mentions environmental concerns or even hints at retaliation for protected activity, and circumstantial evidence does not otherwise suggest it. To be sure, a proximity in time between protected activities which may displease an employer and a potentially adverse job action is sufficient to infer a causal link between the two occurrences. *See generally*, LaTorre v. Coriell Institute For Medical Research, 97 ERA 46 (ALJ, Dec. 3, 1997), *aff'd. and remanded on other grounds*, 98 ARB 40 (February 26, 1999); Mandreger v. The Detroit Edison Co., 88 ERA 17 (Sec., March 30, 1994) (Six month interval between whistleblower activity and adverse job transfer); White v. The Osage Tribal Council, 95 SDW 1 (ARB Aug. 8, 1997) (Proximity in time ... is solid evidence of causation). In this instance, however, no close temporal proximity exists between protected activity

and the termination or the failure to rehire which might imply blacklisting. To the contrary, during the five year period closest in time to the protected activity which occurred at Widows Creek in 1988, TVA assiduously endeavored to reacquire Pickett's services. Thus, accepting Pickett's communication with his Senator as protected activity in 1994, TVA had already demonstrated its willingness to employ him notwithstanding his whistleblowing activities. His protected activities and TVA's failure to rehire, therefore, seem sufficiently remote to negate an inference that the events were related. *See*, Shusterman v. Ebasco Service Inc., 87 ERA 27 (Sec. 1992). Moreover, any inference of a link is dispelled by more than the time sequence of events.

TVA acknowledges that it generally re-employs workers who recover from injuries suffered on the job, and that Pickett has not been rehired. It attributes this to staff downsizing initiatives and the unavailability of positions for Pickett at the time he made himself available for employment five years after his injury, (*See*, Youngblood affidavit at 5), and Pickett adduced no evidence to controvert this statement. Moreover, circumstantial evidence supports it. Under circumstances in which suitable jobs were offered to Pickett, no inference of blacklisting for protected activity arises if those jobs cannot remain open indefinitely.

Nevertheless, Pickett asserts that blacklisting is the real reason TVA rejected him in 1994 and has not since rehired him. He construes his "newly discovered" evidence as confirming his suspicions. Yet, this is a newly asserted allegation first advanced in his July 20, 1999, complaint, and, as previously discussed, it is not supported by any of the "newly discovered" evidence which allegedly demonstrates it.

Now I am not suggesting that Pickett should have been cognizant of a secret plan to blacklist him; however, the alleged existence of such a plan, for any reason, is not supported by any of the "smoking gun" or other documents or facts Pickett cites. The record does, however, confirm that Pickett understood TVA challenged his claim for compensation, that the IG investigated his claim, that TVA terminated his employment in 1993, that it declined to re-hire him in 1994, and that he was aware of all these actions long before he filed his complaint.

To be sure, Pickett, by letter dated March 9, 1999, advised TVA's Director of Human Resources that he was "off Compensation" and requested a "starting date for employment." A response to Pickett's letter was drafted, but apparently not

sent. *See*, Cx 9. Yet, TVA's failure to specify a "starting date" raises no genuine issue of material fact that TVA blacklisted Pickett for engaging in protected activity.

In March, 1999, Pickett was not a TVA employee simply returning to work following a period of disability. He had been terminated five years earlier. While he expressed a broad interest in performing "activities associated with the degree" in Chemical/Environmental Engineering, his March 9th letter failed to identify the job he sought to occupy, his wage expectation, geographic availability, other terms or conditions of employment, or the activities his A.A.S. Degree enabled him to perform. (Compl . Ex. 9). Under such circumstances, TVA's failure to hire Pickett would not seem discriminatory on an objective basis, and he has adduced no evidence that other similarly situated prospective workers were hired based on inquiries which simply stated their availability and interest in unspecified jobs accompanied by a requested "starting date."

I do not construe facts adverse to the party opposing the motion for summary decision by observing that Pickett, under applicable rules, has a burden of production in responding to Respondents' motion.[8] For all of the reasons set forth above, TVA's failure to hire Pickett in response to his March 9 letter creates no genuine issue of material fact that a hostile environment existed or blacklisting was a factor which explains why he was not assigned a "starting date for employment." Beyond that, the notion that "newly discovered" evidence shows that Pickett was blacklisted for engaging in protected activity is devoid of merit and raises no genuine issue of material fact that his complaint was untimely filed.

Withholding and Spoilation of Evidence

Pickett argues further, however, that TVA withheld IG surveillance tapes,

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[8] I am mindful of the Supreme Court's recent decision in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S._____ (2000), which Complainant cites to guide me in allocating the burden of proof. The summary decision rule, however, is not inconsistent with the principle articulated by the Court in Reeves. In responding to TVA's motion, Rule 18.40 (c) places upon Pickett a burden of production. A party may not rest upon mere allegations. Since Pickett has failed to satisfy the burden of production, the inferences considered by the Court in Reeves would not apply here.

interview reports, and trip reports which he requested under the FOIA or Privacy Act and engaged in the spoilation of evidence or documents including the Assistant Unit Operator logs, Stack Monitor reports by destroying the evidence. Obviously, a motion for summary decision must be denied "whenever the moving party denies access to information by means of discovery to a party opposing the Motion." 29 C.F.R. §§18.40(d). That has not occurred here.

Complainant made discovery requests in a prior proceeding, 1999 CAA 25, but while they were pending, he moved that the case be remanded to OSHA for further investigation. In an Order issued September 10, 1999, Pickett's motion to remand was granted, but his simultaneous motion to proceed with discovery was denied on grounds that upon remand, jurisdiction of matter vested in OSHA and the regulations did not contemplate simultaneous discovery while OSHA was conducting its investigation. Pickett was further advised that his request for remand had an impact on his then pending motion and discovery requests. The Order explained, for example, that "discovery requirements in any future litigation which may arise following OSHA's decision on remand may vary depending upon the results of a complete investigation. Whether or not Pickett's allegations against Respondents are confirmed by OSHA on remand, the nature and scope of any appropriate discovery which may be necessary in the future following the remand is, at this time, largely speculative...."

Following OSHA's determination on March 17, 2000, that his complaint lacked merit, Pickett, on March 27, 2000, requested a hearing, and his case was routinely docketed as new proceeding; 2000 CAA 0009. Apparently treating this as the same proceeding with the same record previously remanded to OSHA, Complainant referred in correspondence to motions and discovery requests which were not contained in the record forwarded by OSHA and were not included in this proceeding. He thus requested rulings on motions I had not seen and orders on matters not before me, often incorporating multiple motions or requests within requests in a single piece of correspondence.

To address Complainant's request for rulings on matters with which I was

unfamiliar,[9] I issued, pursuant to Rule 18.29, an Order dated April 18, 2000, advising the parties that this is a new matter and all motions filed in 1999 CAA 0025 shall be filed as new matters in this proceeding. The relatively minor burden and delay this ruling imposed seemed more than justified by the restoration of order it promised, but Pickett objected.

Noting that his motions were not pleadings and his pleadings were not discovery requests, Pickett, by letters dated April 12 and 21, 2000, demanded rulings on his motions and TVA's answers to his motions and the discovery he filed in the prior proceeding. Thus, on April 25, 2000, an Order issued to clarify precisely what the record contained and advised the parties, *inter alia*; "In addition, by letter dated April 12, 2000, Complainant noted that he had discovery requests pending but no discovery motions pending. The file contained none of these documents." [10] Complainant thereafter filed discovery requests which he submitted in form of a Notice of Filing of Discovery Motion Exhibits A, B, C, D,& E, under cover letter dated June 16, 2000, and filed June 20, 2000, twelve days after he responded to the motion for summary decision. Yet his recent filing of discovery motion exhibits fails to demonstrate that TVA either improperly denied him access to information by means of discovery in this matter[11] or violated any discovery order

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[9] For example, in his April 12, 2000, letter Complainant states, "Mr. Pickett also filed his first discovery request on August 27, 1999, which Mr. Pickett understands your honor to have now ordered TVA to respond in full." At the time this letter was filed, I had not seen any discovery requests, objections thereto, if any, or motions to compel, nor had any order issued requiring TVA to respond to any particular discovery request.

[10] Although Complainant references Docket 99 CAA 25 in his correspondence captions, and at times refers to material in that record, he failed to move for consolidation even after being advised that the contents of the record before me do not contain those materials. I do not delve into counsel's litigation strategy for avoiding such a motion when I observe that the process of consolidation, had he pursued it, would have allowed Respondent to file objections, if any, and permitted entry a proper ruling defining the precise contours of the adjudicative record. Procedural matters of this type are not mere technicalities or the elevation of form over substance. They are essential elements of a fair hearing which afford the parties and the trier of fact an opportunity to appreciate the scope of the matters before the court or board and avoid trial by ambush.

[11] In an effort to accommodate Complainant's discovery, I issued an order dated April 5, 2000, which, *inter alia*, postponed the expedited hearing schedule specifically to afford him time to conduct discovery. By letter dated April 21, 2000, Pickett objected, arguing that the

to produce information.[12] Under such circumstances, Rule 18.40(d) does not preclude entry of summary decision.

FOIA and Privacy Act Requests

Pickett also argues that his Motion for Summary Judgment should be granted and TVA's motion denied on the ground that TVA withheld information he demanded under the FOIA and Privacy act. Complainant was advised in the Order dated April 25, 2000, that his requests under the FOIA are beyond the jurisdiction of the presiding judges in environmental whistleblower cases, and are entirely collateral to the pending adjudication. The same is true of his Privacy Act requests.

Unpersuaded, Pickett now seeks to invoke adverse inferences and sanctions because he was unable to secure the information he sought under the FOIA and Privacy Act. (*See*, Complainant's Response to Motion for Summary Judgment and Response, filed June 8, 2000, at pg. 21, citing CX 12 and 13). Yet, there are lawful exemptions and exceptions available to an agency under the FOIA and Privacy Act, and, as Pickett is again advised, it remains beyond the purview of this proceeding to adjudicate the validity of TVA's FOIA response to his requests. If Complainant was dissatisfied with TVA's reply to his collateral demands for information, it was incumbent upon him to proceed in the manner authorized by the applicable statute. Sanctions are not available under 29 C.F.R. Section 18.6(d)(2)(i–v) on the ground that TVA withheld documents requested under the FOIA or the Privacy Act, and TVA has otherwise violated no discovery order issued in this matter.

In addition to withholding information allegedly exempt from disclosure under the FOIA and Privacy Act, TVA acknowledges that it destroyed Widows Creek AUO logs and Stack Monitoring Reports complied in 1988. In response to Pickett's July, 1999 request, TVA advised that it maintained those records for six years, after which, in accordance with TVA's "approved records retention

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postponement was unfair. He insisted that a trial date be set. An Order dated April 25, 2000, thus observed; "Since Complainant's counsel objects to the finding that his efforts to conduct discovery constituted a compelling reason to postpone the scheduling of the hearing, I yield to his assessment." Thus, Complainant was neither rushed nor precluded from conducting appropriate discovery beyond the dictates of his own demands and strategies.

[12] Neither party filed a proposed discovery schedule as required by the April 5, 2000 Order.

schedules," the documents were destroyed in 1995. Dissatisfied with this answer, Pickett complains that TVA's response is inaccurate since there is no record "on the alleged destruction" and Stack Monitoring reports "are down loaded to electronic storage." He thus seeks adverse inferences as a sanction for TVA's spoilation of evidence. TVA's dismisses Pickett charges noting that the destruction occurred four years before Pickett raised claims of protected activity and commenced this litigation.

Here again, Pickett's disbelief and dissatisfaction with TVA's response under the FOIA and Privacy Act constitutes purely collateral matters which do not reside within the purview of the Secretary's jurisdiction. The Department of Labor may not judge the validity of TVA's FOIA and Privacy Act responses any more than TVA could presume to adjudicate the validity of an FOIA response by the Department of Labor. The merits of such matters must be addressed in the proper forum in accordance with enforcement mechanisms provided by the applicable statutes.

Beyond that, Pickett not only has failed to adduce any evidence that TVA lacks a routine document destruction policy, but it would otherwise be difficult to conclude that TVA engaged in sanctionable conduct under Rule 18.6 or 18.40(d) for the destruction or spoilation of information four years before this proceeding commenced in the absence of any notice, prior to the destruction, that the information should have been preserved for discovery. Pickett is, therefore, entitled to no inferences or sanctions under 29 C.F.R. Part 18 as a consequence of his failure to obtain the information which he sought under the FOIA or Privacy Act.[13]

Conclusion

The issue here is whether the statute of limitations is tolled by what Pickett describes as "smoking gun" or other evidence of covert blacklisting provided within 30 days of the date he filed his complaint. Mindful of the Secretary's very cautious approach to the use of summary decision in cases of this type, Richter v. Baldwin Associates, 94-ERA-9 to 10 (Sec'y Mar. 12, 1986)(order of remand), I have approached this matter with considerable reticence. I am, however, for all of

[13] I have, for purposes of adjudicating this matter, accepted, without AUO logs or Stack Monitoring reports, Pickett's allegation that he engaged in the protected activity set forth in his complaint.

reasons set forth above, nevertheless constrained by the evidence adduced by the parties to conclude that Pickett's assertion of a continuing violation or blacklisting is based upon mere allegations. His newly discovered evidence does not support his contentions. If any motive or intent has been demonstrated, it shows a lengthy and assiduous effort by TVA personnel, not to blacklist Pickett for protected activity, but to return him to productive, gainful employment.

Having reviewed TVA's Motion for Summary Decision and Complainant Pickett's response, and his Cross Motion for Summary Judgment, I conclude that, unlike Cox v. Lockheed Martin Energy Systems, Inc., 97 ERA 17 (1997), in which Judge Kerr, as Complainant emphasizes, denied a motion for summary decision, Complainant has failed to adduce facts sufficient to satisfy his burden of production in demonstrating a genuine issue of material fact that TVA retaliated against him in any way for protected activity. For the purpose of adjudicating whether the complaint is barred as untimely filed, I have assumed, unlike the circumstances in Cox, that Pickett, in fact, engaged in protected activity and that TVA management was aware of his activity. Yet, Pickett himself has submitted substantial, undisputed evidence that TVA sought vigorously to provide him with suitable employment, restore him to its workforce, and even offered to pay his moving expenses to return him to the Widows Creek Plant. By the time Pickett finally applied for re-employment in 1994, TVA was downsizing its workforce and limited its outside hiring to "critical positions," and Pickett has not since sought any particular job with TVA.

Crafting a double-edged argument, Pickett in this proceeding construes TVA's five-year effort to get him back to work as retaliation for protected activity even as he alleges that TVA blacklisted him. Inconsistencies aside, considering Pickett's evidence, "newly discovered" or otherwise, direct and circumstantial, the contention that TVA engaged in covert retaliation or blacklisting in response to his protected activities is predicated upon unfounded allegations. Thus, having evaluated his newly discovered documents and other information and having found them devoid of the blacklisting evidence Pickett claims they contain, I conclude that a genuine issue of material fact does not exist regarding the application of the statute of limitations. As such, Pickett's response is insufficient under Rule 18.40(c), and his complaint is barred as untimely filed. Accordingly, Complainant's Motion for Summary Judgment will be denied, and TVA's Motion for Summary Decision dismissing the complaint will be granted.

ORDER

IT IS ORDERED that Summary Decision be, and it hereby is entered as follows:

I. Respondents George T. Prosser and Donald K. Drumm be, and they hereby are, Dismissed as parties; and

II. The Complaint filed by David W. Pickett charging Respondents with violations of the Clean Air Act, 42 U.S.C. 7622, (CAA); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9610, (CERCLA); the Solid Waste Disposal Act, 42 U.S.C. 6971, (SWD); the Safe Drinking Water Act, 42 U.S.C. 300j-9,(SDW); the Federal Water Pollution Control Act, 33 U.S.C. 1367,(FWPC); and the Toxic Substances Control Act, 15 U.S.C. 2622,(TSC), be, and it hereby is, Dismissed as untimely filed; and

IT IS FURTHER ORDERED that Complainant's Cross Motion for Summary Judgment be, and hereby is, Denied.

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STUART A. LEVIN
Administrative Law Judge